168

(5)

Supreme Court, U.S.
AUG 17 2010
OFFICE OF THE CLERK

No. 09-1325

IN THE
Supreme Court of the United States

DAVID H. MILLS, Director of the Indiana Department of Financial Institutions,

Petitioner,

v.

MIDWEST TITLE LOANS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF THE PETITION..... 1

I. No Supreme Court *Commerce Clause* Precedents Address Whether States May Regulate Transactions Executed by their Citizens in Other States, and *Due Process* Precedents Permit Such Regulation..... 1

II. Circuits Disagree Over Whether States May Regulate Loans to Their Citizens Executed in Other States..... 6

III. The Power of States to Protect Citizens from Predatory Loans Executed in Other States is an Important, Recurrent National Issue Deserving Review 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

CASES

Aldens, Inc. v. Packel,
524 F.2d 38 (3d Cir. 1975) 6, 7, 10

Aldens, Inc. v. Ryan,
571 F.2d 1159 (10th Cir. 1978)..... 6, 7, 8, 10

Allstate Insurance Co. v. Hague,
449 U.S. 302 (1981)..... 4

Baldwin v. G.A.F. Seelig,
294 U.S. 511 (1935)..... 2

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996)..... 6

Bonaparte v. Tax Court,
104 U.S. 592 (1881)..... 3, 4

Brown-Forman Distillers Corp. v. New York State Liquor Authority,
476 U.S. 573 (1986)..... 2

Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.,
492 F.3d 484 (4th Cir. 2007)..... 10

Commonwealth v. Events Int'l, Inc.,
585 A.2d 1146 (Pa. Commw. Ct. 1991) 3

CASES (CONT'D)

Harmon v. Concord Volkswagen, Inc.,
598 A.2d 696 (Del. Super. 1991) 3

Healy v. Beer Institute,
491 U.S. 324 (1989) 2

Home Insurance Co. v. Dick,
281 U.S. 397 (1930) 4

Huntington v. Attrill,
146 U.S. 657 (1892) 4

Kaneff v. Delaware Title Loans, Inc.,
587 F.3d 616 (3d Cir. 2009) 5, 6

Marquette National Bank v. First of Omaha Service Corp.,
439 U.S. 299 (1978) 3, 4

New York Life Ins. Co. v. Head,
234 U.S. 149 (1914) 4

Quik Payday, Inc. v. Stork,
549 F.3d 1302 (10th Cir. 2008) 7, 8, 9, 10

Watson v. Employers Liability Assurance Corp.,
348 U.S. 66 (1954) 4

STATUTES

Va. Code § 6.1-481 13

STATUTES (CONT'D)

Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010) 13, 14

REGULATIONS

12 C.F.R. 7.4008(d) 14

OTHER AUTHORITIES

Damian Paletta, *Fight Over Consumer Agency Looms as Overhaul Is Signed*, July 22, 2010, available at http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html 13

Matthew Hathaway, *Loan Wording Circumvents Law: Missouri Lenders Avoid Limits on Title Loans by Classifying Them as Other Loans Secured With Title*, St. Louis Post-Dispatch, August 1, 2010, at E1 12

Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents, 38 Pa. Bull. 3986, July 26, 2008, *available at* http://www.pabulletin.com/secure/data/vol38/38-30/1371.html 13

Sudeep Reddy, *States to Protect Borrowers Who Turn to Cars for Cash*, Wall Street Journal, July 19, 2010, at A3 12

Sudeep Reddy, *Upheaval Sweeps Consumer Finance*, June 25, 2010, at A1 12

REPLY IN SUPPORT OF THE PETITION

In its brief in opposition, Midwest Title makes no attempt to address the State's central point, which is that 300% APR loans to Indiana consumers that (1) originate with Indiana-directed solicitations, (2) are secured by collateral held (and liens recorded) in Indiana, (3) are repaid from Indiana, and (4) inflict harm on Indiana residents, cannot reasonably be understood to occur "wholly outside" of Indiana. What is more, Midwest Title never refutes that, in light of conflicting circuit precedents, Pennsylvania, Oklahoma and other states may regulate Midwest Title's Illinois-executed loans to their citizens, while Indiana may not. Nor does Midwest Title seriously dispute the tension between the Commerce and Due Process Clauses that the decision below created when concluding that Indiana *borrowers* may negate their loan agreements with Midwest Title using Indiana law while an Indiana *agency* may not regulate those loans prophylactically. These conflicts and anomalies, combined with the increasing national importance of consumer-lending regulation, justify Supreme Court review.

I. No Supreme Court *Commerce Clause* Precedents Address Whether States May Regulate Transactions Executed by their Citizens in Other States, and *Due Process* Precedents Permit Such Regulation

The thrust of Midwest Title's brief is that the Seventh Circuit did nothing more than apply well-established Commerce Clause doctrine to Indiana's

attempt to protect its citizens from predatory lending. But Midwest Title stretches *Baldwin*, *Healy* and *Brown-Forman* well beyond their unusual facts—facts that had nothing to do with traditional state consumer protection laws—and ultimately must cite cases arising from *other* provisions of the Constitution. Midwest Title cites no cases where the Court has held that the Commerce Clause precludes states from applying consumer protection laws to transactions executed in other states that injure their citizens. Supreme Court review is warranted to provide necessary guidance concerning the permissible extraterritorial reach of state consumer protection laws, including usury caps.

1. *Baldwin*, *Healy* and *Brown-Forman* do not answer whether Indiana may cap interest on loans extended in other states to Indiana borrowers. *Baldwin* struck down a law prohibiting dealers from reselling in New York milk purchased outside the State at prices lower than the New York minimum. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 519 (1935). By preventing interstate price competition, this law was classic economic protection of in-state producers, and the Court treated it as such. *Id.* *Healy* and *Brown-Forman* similarly struck down statutes that effectively dictated prices charged by out-of-state producers to out-of-state buyers. *See Healy v. Beer Institute*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986). These holdings reflect the underlying principle that the Commerce Clause

precludes protection of in-state interests at the expense of the same out-of-state interests.

This distinction is important because, in contrast with such laws, states have long played a compelling role in protecting their citizens from unfair trade practices that originate in other states. *See, e.g., Harmon v. Concord Volkswagen, Inc.*, 598 A.2d 696, 699 (Del. Super. 1991) (applying Delaware's lemon law to a car sold in Pennsylvania to a Delaware resident); *Commonwealth v. Events Int'l, Inc.*, 585 A.2d 1146, 1151 (Pa. Commw. Ct. 1991) (applying Pennsylvania law to a company that allegedly telephoned Pennsylvania consumers from Florida to solicit fraudulent contributions). Treating Indiana's usury law as equivalent to the protectionist statutes at issue in *Brown-Forman*, *Healy* and *Baldwin* ignores both the rationale for dormant Commerce Clause doctrine and the legitimate historical reach of traditional state consumer protection regulations. The Court needs to take this case to fill the evident doctrinal gap.

2. Aside from its misplaced reliance on *Baldwin*, *Healy* and *Brown-Forman*, Midwest Title attempts to establish "well-settled" Commerce Clause doctrine by citing cases arising under *other* constitutional provisions that do not support, let alone compel, the formalistic result below.[1] *See Bonaparte v. Tax*

---

[1] Similarly, Midwest Title invokes a choice-of-law case decided under the National Bank Act that carries no Commerce Clause implications. *See Marquette National Bank v. First of*

Court, 104 U.S. 592 (1881) (holding that the Full Faith and Credit Clause precluded New York from preempting Maryland taxation); *Huntington v. Attrill*, 146 U.S. 657 (1892) (holding that the Full Faith and Credit Clause required Maryland to permit civil enforcement of a fraud judgment entered in New York in favor of a New York resident).

One case cited by Midwest Title, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 165 (1914), is a due process choice-of-law case. Although the original contract for an insurance policy was signed in Missouri, the Court held that Missouri law did not control a later loan against the policy from the insurer to a beneficiary living in New Mexico. Missouri, the Court held, simply did not have enough significant contacts with the loan since *both* the lender and borrower resided in other states. Analytically, *Head* comports with *Allstate Insurance Company v. Hague*, 449 U.S. 302, 312-13 (1981), *Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, 72 (1954) and *Home Insurance Company v. Dick*, 281 U.S. 397, 408 (1930). In those cases, the totality of state contacts and interests yielded the source of controlling law for due process purposes, in contrast with the formalistic site-of-execution Commerce Clause rule enforced below.

Omaha Service Corp., 439 U.S. 299, 308 (1978) (holding that the National Bank Act, not state law, controlled which state's interest rate cap applied to the bank's credit-card business).

On that score, there can be little doubt that, as the Seventh Circuit agreed, under due process doctrine Indiana's usury caps could properly apply to Midwest Title's loans. Pet. 31-32; Pet.App. 16a. The Seventh Circuit's holding that the Commerce Clause nonetheless dictates a different result when Indiana engages in prophylactic regulation rather than post-hoc remedial litigation is, therefore, highly anomalous and deserving of review.

Midwest Title responds that the Seventh Circuit's analysis of the due process choice-of-law issue may be disregarded as "pure conjecture as to how an Indiana court 'might rule' on a possible choice-of-law dispute in the highly unlikely event of a future lawsuit by Midwest Title against a borrower." Opp. 32. While perhaps Midwest Title need not concern itself with collections lawsuits when it has keys to the collateral, Opp. 5-6, it is the implication of the decision below for future lawsuits, not simply its impact on present litigants, that justifies review.

In that regard, tensions between due process and Commerce Clause choice-of-law analyses could arise in any number of litigation contexts, and in particular if an Indiana borrower were to sue Midwest Title to cancel a loan contract. This prospect is not far-fetched. In the recent title-lending case *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3rd Cir. 2009), a Pennsylvania borrower who drove to Delaware to execute a 300%

APR title loan prohibited by Pennsylvania sued the lender over the interest rate. The case generated a choice-of-law issue regarding arbitration, and the Third Circuit applied Pennsylvania's law owing *precisely* to its public policy against such high-interest title loans. *Id.* at 624. Yet, unless post-hoc remedies are not subject to Commerce Clause limits (and the Court has suggested otherwise, *see, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.17 (1996)), the Commerce Clause rule imposed here would have negated application of Pennsylvania law in *Kaneff* because the contract was executed in Delaware.

Together, this case and *Kaneff* demonstrate that the Court needs to address whether the Commerce Clause imposes strict, formalistic restraints on extraterritoriality that, unchecked, may supplant due process choice-of-law doctrine.

II. Circuits Disagree Over Whether States May Regulate Loans to Their Citizens Executed in Other States

As the Petition established, the decision below conflicts with the Third and Tenth Circuits as to whether the Commerce Clause permits states to regulate consumer loans to their citizens that are "made and executed" in other states. In *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978), and *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), the courts permitted borrowers' home states to cap interest

rates on mail-order credit transactions fully executed in another state. The consumers' states, those courts ruled, had a sufficiently strong interest in protecting their citizens from usury to justify regulation—regardless where the loan agreement was finalized. *See Ryan*, 571 F.2d at 1161-62; *Packel*, 524 F.2d at 47-48. Similarly, in *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008), the Tenth Circuit ruled that a consumer's home state has a sufficiently strong consumer protection interest to justify regulating loans to its citizens from lenders located in other states. In this case, by contrast, the Seventh Circuit negated a borrower-state usury cap on the theory that state power turns entirely on where the transaction was "made and executed" rather than the totality of the state's regulatory interests. *See* Pet.App. 18a.

Critically, Midwest Title nowhere disputes that the laws upheld in *Ryan* and *Packel* would currently govern a Midwest Title loan to a resident of Oklahoma or Pennsylvania, thereby implicitly conceding that, had this case been litigated in either the Third or Tenth Circuit, the result would have been different. This is the hallmark of an irreconcilable circuit conflict in need of Supreme Court review (regardless whether the Seventh Circuit acknowledged it as such).

1. Midwest Title argues that the *Aldens* cases are technically distinguishable because "elements of the transaction [had] occurred in each state." Opp.

21 n.8. But the same can be said here: Midwest Title solicits customers in Indiana, uses the Indiana Bureau of Motor Vehicles to note its lien on the car title, collects payments sent from Indiana, and repossesses defaulting borrowers' cars in Indiana. Opp. 6-7.

In contrast with the decision below, the Tenth Circuit, applying this Court's precedents, "'rejected the contention' that the doctrines of place of contracting and place of performance should govern[.]" *Ryan*, 571 F.2d at 1161. Similarly, in *Quik Payday*, the Tenth Circuit permitted Kansas to regulate loans to its citizens offered from out-of-state over the internet. *Quik Payday*, 549 F.3d at 1308-09. Citing *Ryan*, the decision observed that, in light of the many interests Kansas has in relation to these loans, even regulating a loan to a Kansas resident who applied from a computer in Missouri would not be problematic under the Commerce Clause. *See id.*

Notwithstanding that express statement by the *Quik Payday* court, Midwest Title asserts (without support) that Kansas "recognized" its statute would be unconstitutional as applied to Kansas residents who "entered into Internet payday loans" while in Missouri. Opp. 22. Kansas, however, conceded no invalidity whatever, but merely said that its statute—which Midwest Title itself characterizes as "very similar" to Indiana's law—would apply only where the borrower is in Kansas when *solicited* (and that internet advertisements do not constitute

solicitations). *Quik Payday*, 549 F.3d at 1308. Indiana has similarly limited its territorial reach to loans "resulting from a solicitation received by the borrower in Indiana." Pet.App. 54a. Yet *Quik Payday* confirms that the Tenth Circuit would have ruled differently in this case.

2. Midwest Title also quibbles that the borrowers in the *Aldens* cases mailed, rather than physically handed, their loan applications to the lender. Its point apparently is that, given that distinction, no cases have upheld "a state law regulating loans or purchases entered into *in-person* wholly outside the regulating state's borders." Opp. 20 (emphasis added). For all its formalism, however, the Seventh Circuit's decision does not turn on that particular, seemingly arbitrary, characteristic. The Seventh Circuit's ruling focused on *business* aspects of Midwest Title's loan transactions, and in particular where the loan was "made and executed," Pet.App. 18a, a standard that in no way presumes any particular "in-person" location of the borrower.

Indeed, to illustrate where Midwest Title's loans are "made and executed," the court below cited the physical location not of the *borrower* but of the *lender* (and its money), as well as the location where the lender delivers the loan proceeds, where the borrower legally passes conditional title on the collateral, and where the lender receives payment. Pet.App. 17a. Those same aspects of the transactions in the *Aldens* cases were *also* located in

the non-regulating state, where final acceptance of the terms of the deal, the extension of credit, the shipment of goods subject to a purchase money security interest, and the receipt of payment took place. *See Ryan*, 571 F.2d at 1161; *Packel*, 524 F.2d at 41. *Quik Payday* confirms that the physical location of the borrower was not the critical issue in *Ryan*. *See Quik Payday*, 549 F.3d at 1308-09. Thus, Midwest Title's suggestion that those cases are distinguishable from the decision below is wholly unsupported.

3. Finally, Midwest Title attempts to smooth over the differences among circuits by citing a Fourth Circuit case, *Carolina Trucks & Equipment, Inc. v. Volvo Trucks of North America, Inc.*, 492 F.3d 484 (4th Cir. 2007). That case neither refutes the conflict among the Third, Seventh and Tenth Circuits nor has any bearing on the validity of interstate application of traditional consumer protection laws. The South Carolina franchise law at issue prevented sales to South Carolina residents by out-of-state dealers who did not have a South Carolina franchise license. The whole point of the law was to "limit competition with local vehicle dealerships from both manufacturers and other dealers." *Id.* at 488. There has been no assertion that Indiana's consumer-lending statute similarly exists to protect in-state lenders from out-of-state competition. Accordingly, *Carolina Trucks* tells us nothing about how the Fourth Circuit (or the Third or Tenth Circuits) would have handled this case.

III. The Power of States to Protect Citizens from Predatory Loans Executed in Other States is an Important, Recurrent National Issue Deserving Review

Midwest Title suggests that Indiana's attempt to protect its consumers from out-of-state predatory lenders is "unique[.]" Opp. 1. That is incorrect; at least 20 other states have similar laws that regulate consumer loans "made and executed" in other states. *See* Pet. 17-20. Like Indiana, some states have usury laws that apply when a creditor advertises or solicits within the state. *Id.* at 17-18 (D.C., Kansas, Maine, New York, North Carolina). Others apply state law when payments are made from, or the proceeds of the loan are used in, the debtor's state. *Id.* at 19-20 (Minnesota, Ohio, Oregon, West Virginia, Vermont). Some states apply their law when a loan exceeds a certain value, carries a particular rate of interest, or is made to any resident of the state. *Id.* (Connecticut, New Mexico; Ohio, Pennsylvania, South Carolina, Virginia). Still others choose to limit liability on out-of-state loans to their residents to amounts that would be allowed for in-state loans. *Id.* (California, Oklahoma, Rhode Island, West Virginia, Wyoming). The application of *all* these laws to loans "made and executed" in another state would be affected by Supreme Court review of this case.

What is more, the multiple state statutes regulating consumer loans to their citizens reflect an

increasingly significant nationwide concern about lenders who charge high rates to the desperate and unwary. This summer alone, the Wall Street Journal has featured *two* stories in its front section—one on its front page—examining consumer lending practices and attempts to regulate that market. *See* Sudeep Reddy, *States to Protect Borrowers Who Turn to Cars for Cash*, Wall Street Journal, July 19, 2010, at A3 (discussing state attempts to protect consumers from abusive title loans); Sudeep Reddy, *Upheaval Sweeps Consumer Finance*, June 25, 2010, at A1 (discussing recent changes to state consumer finance laws). And just this month, the St. Louis Post-Dispatch examined the plight of Missouri consumers deeply indebted to title loan companies that have exploited regulatory loopholes. *See* Matthew Hathaway, *Loan Wording Circumvents Law: Missouri Lenders Avoid Limits on Title Loans by Classifying Them as Other Loans Secured With Title*, St. Louis Post-Dispatch, August 1, 2010, at E1. The newspaper told the story of Sandra Ahmedin who borrowed $800 from a title loan company to help pay her rent after incurring unexpected medical bills and now has paid at least $3,100 in interest without decreasing the principal. *Id.*

As these reports confirm, states have compelling reasons, particularly in the continuing national economic downturn, to protect their residents from over-collateralized 300% APR loans that engender cycles of unmanageable debt, no matter where those

loans are extended. And the recent actions of Indiana and other states to enforce their usury laws extraterritorially demonstrate that this issue is nationally significant. *See* Va. Code § 6.1-481 (regulating title loans to Virginia residents, no matter where executed); *Notice to those Engaging or Considering Engaging in Nonmortgage Consumer Lending to Pennsylvania Residents*, 38 Pa.B. 3986, July 26, 2008 (confirming that Pennsylvania law applies to any loan to Pennsylvania residents at annual rates greater than 6%).

Further underscoring the degree to which states perform a critical regulatory role in the area of consumer lending is the recently enacted Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010). First, the Act generally substantiates the national importance of financial-sector regulation in light of lender abuses. *See* Damian Paletta, *Fight Over Consumer Agency Looms as Overhaul Is Signed*, July 22, 2010, available at http://online.wsj.com/article/SB10001424052748704746804575367502836650966.html (the agency will "protect Americans from abusive financial practices such as hidden fees in the fine print, which . . . helped cause the financial crisis"). Second, while the Act itself regulates national banks, federal savings associations, and mortgage originators, it rolls back the federal government's authority to preempt states from applying consumer protection laws to national bank affiliates and makes clear that federal consumer protection standards are

merely a floor, not a ceiling. *See* Wall Street Reform and Consumer Protection Act §§ 502, 1041, 1044-1046, 1083; *see also* 12 C.F.R. 7.4008(d).

In short, states remain responsible for regulating payday loans, title loans and other non-mortgage consumer loans. Supreme Court review is necessary to create a uniform standard respecting the extent to which states may protect their citizens from predatory loans "made and executed" in other states.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER L. HAGAN
ASHLEY TATMAN HARWEL
Deputy Attorneys General

Counsel for Petitioner

Dated: August 17, 2010